

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

VU M. HOANG,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of  
the Social Security Administration,

Defendant.

Case No. 09-cv-0896-JCC-JPD

REPORT AND RECOMMENDATION

I. INTRODUCTION AND SUMMARY CONCLUSION

Plaintiff Vu M. Hoang appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied his applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be REVERSED IN PART and REMANDED for further administrative proceedings.

II. FACTS AND PROCEDURAL HISTORY

Plaintiff is a 43-year-old man with a second grade education. Administrative Record (“AR”) at 78, 86. His past work experience includes employment as a baker, cabinet finisher,

1 caregiver, fish cleaner and fish processor. AR at 83. Plaintiff was last gainfully employed in  
2 2005. AR at 60, 83, 121.

3 On February 28, 2006, Plaintiff filed a claim for SSI payments and an application for  
4 DIB, alleging an onset date of November 13, 2005. AR at 65. Plaintiff asserts that he is  
5 disabled due to HIV. Dkt. No. 12 at 2.

6 The Commissioner denied Plaintiff's claim initially and on reconsideration. AR at 51.  
7 Plaintiff requested a hearing which took place on April 17, 2008. AR at 401. On May 19,  
8 2008, the ALJ issued a decision finding Plaintiff disabled for a closed period from January 1,  
9 2006 to August 10, 2007, but finding Plaintiff not disabled thereafter. AR at 18-28. The ALJ  
10 denied benefits after the closed period based on his finding that Plaintiff could perform a  
11 specific job existing in significant numbers in the national economy. *Id.* On April 27, 2009,  
12 after reviewing additional evidence, the Appeals Council denied Plaintiff's request for review,  
13 AR at 5, making the ALJ's ruling the "final decision" of the Commissioner as that term is  
14 defined by 42 U.S.C. § 405(g). On June 30, 2009, Plaintiff timely filed the present action  
15 challenging the Commissioner's decision. Dkt. No. 1.

### 16 III. JURISDICTION

17 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C.  
18 §§ 405(g) and 1383(c)(3).

### 19 IV. STANDARD OF REVIEW

20 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
21 social security benefits when the ALJ's findings are based on legal error or not supported by  
22 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th  
23 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is  
24 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.  
25 *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750  
26 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in

1 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,  
 2 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a  
 3 whole, it may neither reweigh the evidence nor substitute its judgment for that of the  
 4 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is  
 5 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that  
 6 must be upheld. *Id.*

7 The Court may direct an award of benefits where "the record has been fully developed  
 8 and further administrative proceedings would serve no useful purpose." *McCartey v.*  
 9 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292  
 10 (9th Cir. 1996)). The Court may find that this occurs when:

11 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the  
 12 claimant's evidence; (2) there are no outstanding issues that must be resolved  
 13 before a determination of disability can be made; and (3) it is clear from the  
 14 record that the ALJ would be required to find the claimant disabled if he  
 considered the claimant's evidence.

15 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that  
 16 erroneously rejected evidence may be credited when all three elements are met).

## 17 V. EVALUATING DISABILITY

18 As the claimant, Plaintiff bears the burden of proving that he is disabled within the  
 19 meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th  
 20 Cir. 1999). The Act defines disability as the "inability to engage in any substantial gainful  
 21 activity" due to a physical or mental impairment which has lasted, or is expected to last, for a  
 22 continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A).  
 23 A claimant is disabled under the Act only if his impairments are of such severity that he is  
 24 unable to do his previous work, and cannot, considering his age, education, and work  
 25 experience, engage in any other substantial gainful activity existing in the national economy.  
 26 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

1 The Commissioner has established a five step sequential evaluation process for  
2 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R.  
3 §§ 404.1520, 416.920. The claimant bears the burden of proof during steps one through four.  
4 At step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at  
5 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step  
6 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.  
7 §§ 404.1520(b), 416.920(b).<sup>1</sup> If he is, disability benefits are denied. If he is not, the  
8 Commissioner proceeds to step two. At step two, the claimant must establish that he has one  
9 or more medically severe impairments, or combination of impairments, that limit his physical  
10 or mental ability to do basic work activities. If the claimant does not have such impairments,  
11 he is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe  
12 impairment, the Commissioner moves to step three to determine whether the impairment meets  
13 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),  
14 416.920(d). A claimant whose impairment meets or equals one of the listings for the required  
15 twelve-month duration requirement is disabled. *Id.*

16 When the claimant’s impairment neither meets nor equals one of the impairments listed  
17 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s  
18 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the  
19 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work  
20 to determine whether he can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If  
21 the claimant is able to perform his past relevant work, he is not disabled; if the opposite is true,  
22 then the burden shifts to the Commissioner at step five to show that the claimant can perform  
23 other work that exists in significant numbers in the national economy, taking into consideration  
24 the claimant’s RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g),

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25 <sup>1</sup> Substantial gainful activity is work activity that is both substantial, *i.e.*, involves  
26 significant physical and/or mental activities, and gainful, *i.e.*, performed for profit. 20 C.F.R.  
§ 404.1572.

416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the claimant is unable to perform other work, then the claimant is found disabled and benefits may be awarded.

## VI. DECISION BELOW

On May 19, 2008, the ALJ issued a decision finding the following:

1. The claimant met the insured status requirements of the Social Security Act as of January 1, 2006, the date the claimant became disabled.
2. The claimant engaged in substantial gainful activity from November 13, 2005, the alleged onset date, through December 31, 2005. He has not engaged in substantial gainful activity since January 1, 2006.
3. At all times relevant to this decision, the claimant has had the following severe impairments: HIV infection and hepatitis.
4. From January 1, 2006 through August 10, 2007, the period during which the claimant was disabled, the claimant did not have an impairment or combination of impairments that met or medically equaled an impairment listed in 20 CFR Part 404, Subpart P, Appendix 1.
5. After careful consideration of the entire record, I find that, from January 1, 2006 through August 10, 2007, the claimant had the residual functional capacity to perform sedentary work as defined in 20 CFR 404.1567(a) and 416.967(a) except he could only occasionally climb ramps and stairs and could not climb ladders, ropes or scaffolds. He should avoid concentrated exposure to pulmonary irritants and hazards. He could not work on a sustained basis, 40 hours per week, because of medication side effects.
6. From January 1, 2006 through August 10, 2007, the claimant was unable to perform past relevant work.
7. The claimant was born on [REDACTED], 1966<sup>2</sup> and was 39 years old, which is defined as a younger individual age 18-44, on the alleged disability onset date.
8. The claimant is not able to communicate in English, and is considered to be in the same category as an individual who is illiterate in English.

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<sup>2</sup> The actual date of birth is deleted in accordance with Western District of Washington Local Rule CR 5.2.

- 1 9. Because he could not work on a full-time basis, the claimant's  
2 acquired job skills do not transfer to other occupations within the  
3 residual functional capacity assessed for the period from January 1,  
4 2006 through August 10, 2007.
- 5 10. From January 1, 2006 through August 10, 2007, considering the  
6 claimant's age, education, work experience, and residual functional  
7 capacity, there were no jobs that existed in significant numbers in the  
8 national economy that the claimant could have performed.
- 9 11. The claimant was under a disability, as defined by the Social Security  
10 Act, from January 1, 2006 through August 10, 2007.
- 11 12. Medical improvement occurred as of August 11, 2007, the date the  
12 claimant's disability ended.
- 13 13. Beginning on August 11, 2007, the claimant has not had an  
14 impairment or combination of impairments that meets or medically  
15 equals one of the impairments listed in 20 CFR Part 404, Subpart P,  
16 Appendix 1.
- 17 14. After careful consideration of the entire record, I find that, beginning  
18 on August 11, 2007, the claimant has had the residual functional  
19 capacity to perform sedentary work as defined in 20 CFR 404.1567(a)  
20 and 416.967(a), with the postural and environment limitations noted in  
21 Finding 5.
- 22 15. The medical improvement that has occurred is related to the ability to  
23 work.
- 24 16. Since August 11, 2007, the claimant's age category has not changed.
- 25 17. Beginning on August 11, 2007, the claimant has been unable to  
26 perform past relevant work.
- 18 18. Beginning on August 11, 2007, transferability of job skills is not  
19 material to the determination of disability because using the Medical-  
20 Vocational Rules as a framework supports a finding that the claimant  
21 is "not disabled," whether or not the claimant has transferable job  
22 skills.
- 23 19. Beginning on August 11, 2007, considering the claimant's age,  
24 education, work experience, and residual functional capacity, the  
25 claimant has been able to perform a significant number of jobs in the  
26 national economy.

20. The claimant's disability ended on August 11, 2007.  
AR at 22-28.

## VII. ISSUE ON APPEAL

The principal issue on appeal is whether the ALJ erred in his interpretation of Social Security Ruling 93-2p. Dkt. Nos. 12 at 2-8; 13 at 5-10; 15 at 2-6.

## VIII. DISCUSSION

### A. The ALJ Erred in His Interpretation of Social Security Ruling 93-2p.

The ALJ held that HIV cases that meet a listing have a 12-month duration requirement. However, the language of Social Security Ruling ("SSR") 93-2p makes plain that HIV cases that meet a listing do *not* have a 12-month duration requirement:

. . . an individual who has an impairment that meets or equals one of the listed criteria required in listing 14.08 or 114.08 (the HIV listings) has an impairment that is considered permanent or expected to result in death. Accordingly, if an individual has an HIV infection of this severity, a separate finding on the duration of the impairment is not required, and the evidence required under sections 404.1525(a) and 416.925(a) of the regulations showing that the impairment has lasted or is expected to last for a continuous period of at least 12 months is not necessary.

SSR 93-2p, *available at* 1993 WL 409835. Notwithstanding this plain language, the ALJ refused to accept that there is no duration requirement for HIV cases meeting a listing, concluding instead that SSR 93-2p only applies to cases in which the HIV impairment "currently meets" a listing. AR at 24.

There is no basis to reach the ALJ's conclusion from the plain language of SSR 93-2p. The only reasonable conclusion is that SSR 93-2p eliminated the duration requirement with respect to HIV cases that meet a listing. Nowhere in SSR 93-2p does language appear concerning *when* a claimant's HIV impairment must meet a listing to avoid the duration requirement. If a claimant must have a listed HIV impairment as of particular point in time in order to avoid the duration requirement, it follows that SSR 93-2p would have included

1 language specifying when that critical point in time is. Absent such language, the Court can  
2 only conclude that a claimant's HIV impairment may meet a listing at any time to avoid the  
3 duration requirement.

4 Moreover, the ALJ's interpretation does not withstand even basic scrutiny. What does  
5 the ALJ mean by "currently meets" a listing? At the time of the claimant's application for  
6 disability benefits? At the time of the administrative hearing? Or at the time the ALJ's  
7 decision is issued? If, for example, the ALJ means at the time of the hearing, a claimant's HIV  
8 impairment would or would not be subjected to the duration requirement depending on  
9 arbitrary circumstances. To illustrate, suppose a claimant met an HIV listing at the time of his  
10 application for disability benefits. Suppose further that he eventually began experiencing  
11 medical improvement in his condition. Then, whether the claimant's HIV impairment would  
12 be subjected to the duration requirement would depend on how long it took his claim to work  
13 through the administrative process. If he swiftly received a hearing, his HIV impairment  
14 would likely still meet an HIV listing at the time of hearing and it would not be subjected to  
15 the duration requirement. Conversely, if several months passed before he received a hearing,  
16 his HIV impairment may no longer meet a listing by the time of the hearing, and,  
17 consequently, it would be subjected to the duration requirement. Whether or not a claimant's  
18 HIV impairment is subject to the duration requirement is significant because it will determine  
19 whether the Commissioner must establish medical improvement before revoking benefits.

20 Turning to the instant case, the ALJ stated in his decision that Plaintiff "likely met an  
21 HIV listing under section 14.08 for a brief period," although the ALJ did not specify which  
22 HIV listing. AR at 23. In addition, the ALJ did not conclusively determine whether Plaintiff  
23 in fact met an HIV listing, leaving the matter vague and uncertain by stating that the Plaintiff  
24 "likely" met an HIV listing. *Id.* In any case, if in fact Plaintiff met an HIV listing, according  
25 to Social Security Ruling 93-2p, the duration requirement did not apply to Plaintiff's HIV  
26 condition, and the ALJ could not deny benefits unless he determined that Plaintiff experienced



1 medical improvement as set forth in the regulations. However, because the ALJ improperly  
2 held that the duration requirement did apply, and because he found that Plaintiff's listed HIV  
3 impairment did not satisfy the 12-month duration requirement, he denied benefits without first  
4 determining whether Plaintiff experienced medical improvement.<sup>3</sup> This was error that requires  
5 reversal.

6 On remand, the Appeals Council shall assign a different ALJ to this matter. The new  
7 ALJ shall make a determination as to whether Plaintiff's HIV ever met or equaled one of the  
8 listed criteria required in listing 14.08. If so, the ALJ must then determine whether Plaintiff  
9 has experienced medical improvement in his HIV condition, pursuant to the sequential  
10 evaluation process in the applicable regulations, before denying benefits. *See* 20 C.F.R.  
11 § 404.1594(f), 20 C.F.R. § 416.994(b)(5). If warranted, the ALJ is directed to develop the  
12 medical record further.

#### 13 IX. CONCLUSION

14 For the foregoing reasons, the Court recommends that this case be REVERSED IN  
15 PART and REMANDED for further administrative proceedings. The Court recommends that  
16 the portion of the ALJ's decision finding that Plaintiff was disabled for a closed period from  
17 January 1, 2006 to August 10, 2007 be AFFIRMED. A proposed order accompanies this  
18 Report and Recommendation.

19 DATED this 2nd day of April, 2010.

20   
21 JAMES P. DONOHUE  
22 United States Magistrate Judge  
23  
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25 <sup>3</sup> Although the ALJ found Plaintiff disabled for a 19-month closed period, he  
26 determined that Plaintiff's disability was due to medication side effects which precluded full  
time work, not Plaintiff's HIV condition. AR at 24-25.